Care Manor of Farmington, Inc. ***and*** **Ramonita Bonet.** Case 34–CA–6253

August 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On July 12, 1994, Administrative Law Judge Wallace H. Nations issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The General Counsel excepts to the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) of the Act by warning Charging Party Ramonita Bonet on June 26, 1993, and terminating her on July 24, 1993,[2] for ''excessive absenteeism'' and ''failure to notify [her] supervisor.'' For the reasons set forth below, we disagree with the judge and find merit in the exceptions.

As the judge observed, in order to establish that an employer's discharge or discipline of an employee violates Section 8(a)(3), the General Counsel must establish that union activity was a motivating factor in the action taken against the employee. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983), approving *Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Once the General Counsel has met this burden, the burden then shifts to the employer to establish, by a preponderance of the evidence, that it would have taken the action even in the absence of the employee's union activity. *Wright Line*, supra.

In the instant case, the record establishes that Bonet was openly active in the organizing campaign begun in September 1992 by New England Health Care Employees Union, District 1199, SEIU, AFL–CIO at the Respondent's nursing care facility. She distributed authorization cards and attended union meetings at a nearby restaurant, as well as two negotiating sessions between the Union and another of the Respondent's facilities. The Respondent's administrator, Janet Acousti, also attended those sessions. The campaign culminated in the Union's certification on July 8. The Respondent terminated Bonet less than 3 weeks later.

The record clearly establishes the Respondent's animus toward the Union generally and Bonet in particular. Thus, the Board has already found in a related proceeding that, during the Union's organizing campaign, the Respondent: (1) promulgated an unlawful no-solicitation rule, interrogated its employees, and threatened them with discharge if they continued engaging in union activities, in violation of Section 8(a)(1) the Act; (2) discriminatorily discharged two employees in violation of Section 8(a)(3); and (3) removed an employee from her work schedule and terminated her in violation of Section 8(a)(3) and (4). *Care Manor of Farmington, Inc.*, 314 NLRB 248 (1994). These violations occurred as late as February 1993, less than 6 months before Bonet's final warning and termination. Significantly, in that prior proceeding, the Respondent was also found to have violated Section 8(a)(3) by issuing written warnings and a suspension to Bonet in December 1992 because of her union activities, including a disciplinary warning for absenteeism issued December 15, 1992. Id. at 255. Based on the foregoing, and on the Respondent's unlawful application of its disciplinary policy, discussed below, we find that the General Counsel has established that Bonet's discharge was discriminatorily motivated.[3]

The Respondent contends that the action taken against Bonet was lawful because it was prompted by her reporting late for work on July 17, failing to report or ''call out'' on July 19, calling out on July 21, 22, and 26, and calling out less than 2 hours before her

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Except as clarified below, we have carefully examined the record and find no basis for reversing the findings.

We note that the judge generally credited the testimony of the Respondent's witness, Raquel Reyes, that Bonet was terminated for violation of its absenteeism policy. As explained below, however, we have found that the Respondent was not entitled to rely on its prior unlawful discipline of Bonet in December 1992, or on Bonet's conduct in June 1993 that apparently complied with its disciplinary system, to justify Bonet's termination under its progressive disciplinary policy. Accordingly, although we disagree with the judge's ultimate conclusion concerning motive, we do not view our treatment of the evidence as inconsistent with the judge's credibility resolutions.

[2] Except where otherwise stated, all dates refer to 1993.

[3] It is true, as the Respondent points out in its answering brief, that there is no direct evidence of concurrent union animus in the instant case. The severity of the prior unfair labor practices, however, the fact that Bonet was a target of them, and the timing of her discipline in the instant case in proximity to the litigation of the prior case and to the Union's certification distinguish this case from *Trustees of the College of Holy Cross*, 297 NLRB 315 (1989), and *Carolina Paper Mills, Inc.*, 254 NLRB 1071 (1981), on which the Respondent relies. Additionally, we note that in *Care Manor of Farmington, Inc.*, 318 NLRB 330 (1995), the Board found that the Respondent unlawfully refused to bargain with the newly certified Union within a week of Bonet's termination; we therefore find that the Respondent's union animus continued through the time it discharged Bonet.

shift on July 23.[4] The Respondent, in its letter brief to the judge and its answering brief to the Board, does not specifically address the warning issued to Bonet in June. For the reasons stated below, we reject the Respondent's reliance on Bonet's absenteeism and find that it was used as a pretext for the discipline imposed in June and July.

The Respondent has a written, four-step progressive disciplinary policy on absenteeism. The policy, in pertinent part: (1) requires that employees ask to be excused for time off in the future; (2) requires employees to communicate with the Respondent concerning a prospective absence (call out) at least 2 hours prior to the start of their shift if they cannot report to work; (3) deems employees to have voluntarily resigned if they are absent for 2 or more consecutive days and fail to call out; and (4) defines excessive absenteeism as two or more unexcused absences in a 30-day period, with two latenesses counted as one absence. The policy further indicates that if attendance reflects the foregoing ''patterns of behavior, your [s]upervisor will . . . issue an official verbal warning.'' Continued violation of the policy results in a second written warning, followed by a final written warning, and termination if the final written warning is disregarded. The Respondent presented no evidence to clarify if or how an absence may be considered to be unexcused for reasons other than a failure to provide the 2 hour advance call-out notice.

Bonet's disciplinary record for absenteeism nominally tracks this four-step procedure, but it fails to establish in response to the General Counsel's *Wright Line* prima facie case that her discipline would have resulted regardless of her union activity. On the contrary, and as explained below, such reliance does not withstand scrutiny and establishes the illegality of the final warning and termination.

The Respondent's progressive disciplinary policy on absenteeism requires a verbal warning and two written warnings prior to a termination. Her personnel file shows that she received verbal warnings for failing to call out in August 1991. In December 1992, she received a verbal warning purportedly for twice failing to call out. As detailed above, the December 1992 discipline was found to have violated the Act.[5] The record of discipline was never removed from her personal file, however, and its continued operative effect necessarily tainted all subsequent discipline that relied on it under the Respondent's established progressive discipline system. The Respondent was not entitled to rely on the unlawful disciplinary warnings to support Bonet's subsequent discharge. See *Dynamics Corp.*, 296 NLRB 1252 (1989).

From December 29, 1992, through April 8, Bonet was out of work with a back injury. Approximately 3 weeks after she returned to work, the complaint in the prior proceeding issued. Thereafter, on June 24, Bonet received a ''final warning'' for calling out on June 11 and 17.[6] As the judge noted, counsel for the Respondent conceded at the hearing, and Bonet's phone records establish, that she called out in a timely manner on those dates. In the face of this explicit concession, it is apparent that Bonet in fact adhered to the call-out rule. In the absence of any further clarification for this warning, and in view of the nature of the Respondent's affirmative burden upon the General Counsel's prima facie showing of an unlawful motive, we find that the Respondent has failed to establish that any discipline was warranted based on Bonet's absences in June. We therefore find that the June warning was unlawful. On July 26, as a result of additional absences that month, Bonet was terminated.[7] In view of the unlawful application, however, of the Respondent's progressive disciplinary policy at the second and third steps, the Respondent's decision to terminate Bonet for a purported infraction at the fourth step is unlawful, even assuming that Bonet's absences were the basis for this final disciplinary measure. *Dynamics Corp.*, above.

Although the judge found that Bonet was absent for 6 consecutive scheduled workdays without providing a physician's note, we note that the Respondent's written policy is silent on medical excuses, that Bonet called out in accordance with the written policy on each day except July 19 and 23, and that in any event the decision was made to terminate her while she was out sick and before she could provide such documentation. Significantly, the Respondent tolerated Bonet's prolonged absence due to her back injury from December 1992 to April without repercussion. It was only after the issuance of the complaint in the prior proceeding and certification of the Union that the Respondent deemed her absences due to back pain intolerable. On the basis of the foregoing, we find that the Respondent has

[4] Reyes testified that Bonet's work performance was not considered in terminating her.

[5] 314 NLRB 248, 255 (1994). The judge's decision, adopted by the Board issued on October 22, 1993.

[6] The written warning in evidence states that ''Ramonita Bonet called out on 6/11/93; 6/17/93 thus violating the absenteeism policy. Will review employee file.'' Bonet also received a 3-day suspension on June 24 for failing to clean a room. The complaint alleged that the suspension violated the Act, and the judge made no specific findings about it. In the absence of exceptions, we adopt the judge's finding, implicit in his dismissal of the complaint, that the suspension did not violate the Act. The Respondent concedes that performance related discipline was not a factor in the Respondent's decision to discharge Bonet.

[7] As explained below, it appears that Bonet did violate the Respondent's absenteeism policy as a result of her attendance record in July. Specifically, the judge found that Bonet was late to work on July 17, absent from work without calling out on July 19, and absent July 21 through 23, and July 26 because of back pain. Bonet followed the call-out procedure on July 21, 22, and 26, but was late calling out on July 23. Accordingly, the evidence shows that she was absent on July 19 and 23 without complying with the Respondent's call-out procedure.

failed to establish its *Wright Line* defense and that its final warning to and termination of Bonet violated Section 8(a)(3) and (1). Accordingly, we shall order that the Respondent offer reinstatement to Bonet and make her whole for any loss suffered as a result of her unlawful termination.[8]

ORDER

The National Labor Relations Board orders that the Respondent, Care Manor of Farmington, Inc., Farmington, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing a final warning to and discharging employees in retaliation for their activities on behalf of the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Ramonita Bonet full and immediate reinstatement to her former position of employment or, if that position is no longer available, to a substantially similar position without prejudice to her seniority or other rights and privileges, and make her whole for the loss she suffered as a result of the discrimination against her, with interest, in the manner set forth in this decision.

(b) Remove from its files all mention of the unlawful warning and termination and notify Bonet that this has been done and that evidence of this unlawful activity will not be used as a basis of future actions against her.

(c) Preserve and, on request, make available to the Board or its agents for examination or copying all records and documents necessary to analyze and determine the amount of backpay owed to Bonet.

(d) Post at its facility in Farmington, Connecticut, copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous place, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT issue a final warning to and discharge you in retaliation for your activities on behalf of the Union.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Ramonita Bonet full and immediate reinstatement to her former position of employment or, if that position is no longer available, to a substantially similar position without prejudice to her seniority or other rights and privileges previously enjoyed, and WE WILL make her whole for the loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify her that we have removed from our files all mention of the unlawful warning and termination and that evidence of this unlawful activity will not be used against her in any way.

CARE MANOR OF FARMINGTON, INC.

Thomas W. Doerr, Esq., for the General Counsel.
Stuart Bochner, Esq., of South Orange, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Based upon a charge filed August 2, 1993,[1] and an amended charge

[8] Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] All dates are in 1993 unless otherwise noted.

filed September 30, by Ramonita Bonet, an individual, the Regional Director for Region 34 issued a complaint and notice of hearing (complaint) against Care Manor of Farmington, Inc. (Care Manor or Respondent) on September 30. The complaint alleges that Respondent suspended and then discharged its employee Bonet for discriminatory reasons in violation of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). The Respondent has filed an answer to the complaint wherein it admits the jurisdictional allegations and the supervisory status of its administrator, Janet Acousti, and Supervisor Raquel Reyes.

Hearing was held in these matters in Hartford, Connecticut, on February 7, 1994. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Connecticut corporation with an office and place of business in Farmington, Connecticut, has at all material times been engaged in the operation of a nursing home. Having admitted in its answer the jurisdictional allegations of the complaint, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

New England Health Care Employees Union, District 1199, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that Respondent violated the Act by:

1. About June 24, issuing a written warning and suspension to Bonet.
2. About July 26, terminating Bonet's employment.

A. *Background Facts and Previous Discipline of Bonet*

Ramonita Bonet began working for Respondent in March 1990 and was employed by Respondent as a housekeeping and laundry aide until her termination on July 26. Her normal working hours were from 8 a.m. until 4 p.m. In September 1992, she became aware of the Union's attempt to organize a group of Respondent's employees and became involved in the organizing effort in December 1992. She attended union organizing meetings, signed an authorization card, and solicited the signatures of two or three other housekeeping employees on authorization cards. The union organizing meetings were held at the Silo Restaurant which is nearby Respondent's nursing home. At the invitation of the Union, she attended two bargaining sessions between the Union and another nursing home owned by Michael Konig, owner of Respondent. These sessions were also attended by Respondent's administrator, Janet Acousti. She would then report what happened at these sessions to the other housekeeping employees.

The Union's organizing effort was successful and after winning a Board election, it was certified on July 8 as the exclusive collective-bargaining representative of a unit of Respondent's employees, including its housekeeping employees. Bonet received a verbal warning on December 15, 1992, and two warnings and a 3-hour suspension without pay on December 24, 1992. The first warning alleged that Bonet violated the Respondent's 30-day absenteeism policy, which states if any employee within 30 days calls out of work when scheduled to work twice or more is subject to disciplinary actions. The warning given her on December 24, 1992, related to alleged unsatisfactory job performance. The two December 1992 warnings were the subject of an unfair labor practice hearing at which Bonet testified. The administrative law judge conducting the hearing issued a decision dated October 22, in which he found, inter alia, that Respondent's actions against Bonet violated Section 8(a)(1) and (3) of the Act.

Bonet had also been given a previous warning in August 1991 related to absenteeism. It involved her failure to call 2 hours in advance of her shift to announce that she would not work as scheduled. This was an official verbal warning.

B. *Facts Relating to the Involved Discipline Against Bonet*

On December 29, 1992, Bonet suffered a back injury on the job and as a result did not work from that date until April 8. She filed a claim for workmen's compensation for this time. On June 24 she received a warning and suspension. She testified that on June 11, because of back pain, she called out sick. According to Bonet she called at about 5:28 a.m. and spoke with the nurse in charge of her shift. She could not recall the name of the nurse. On June 17, she again experienced back pain. On this occasion, she called the third shift supervising nurse at about 5:23 a.m., asking that Bonet's supervisor, Raquel Reyes, be told that Bonet would not be in the following Monday, or the day of the call, one or the other. The record is unclear as to what Bonet meant on this point. She testified that June 17 was a Saturday in 1993, whereas it was actually a Thursday.

In any event she missed June 17 and thereafter worked on June 18 and her other scheduled days until June 24. During this period, no one from management said anything to her about a problem with her attendance. Reyes testified that she gave Bonet a warning on June 21, but was not absolutely sure of the date. The written warning is dated June 21. According to Bonet, on June 24, she was called into Administrator Acousti's office at the end of her shift. She was told by Acousti and Supervisor Reyes that she had violated the policy against having two sick outs in a 30-day period.[2] This

[2] Respondent's policy on absenteeism is as follows:

> Our work goes on 24 hours a day, seven days a week. The work of all departments is interrelated, and your presence is very important if we are to avoid interruption of the services we offer to our patients. For this reason, we have rules regarding absenteeism and lateness. To insure the fair administration of these rules, your Supervisor maintains a record of your attendance. Failure to comply with the company's rules will lead to disciplinary action and up to possible termination of your employment. Absenteeism policy is as follows:
>
> 1. If you know will need time off in the future, consult with your Supervisor and ask to be excused. Your Supervisor will make every effort to make the requested time available.

is the same rule she allegedly violated in December 1992. She explained to the supervisors that she missed work because of her back pain and noted that she had called in.[3] She was also given a warning and a 3-day suspension for leaving a tissue on the floor of a room she had cleaned. Bonet told them she cleans 60 rooms a day and cannot be in all the rooms just to pick up a tissue dropped by a resident. Acousti did not identify the room involved, saying only that, ''Somebody complained about the room.'' This incident is similar to the one which resulted in her receiving a suspension in December 1992.[4] Reyes testified that the unsatisfactory performance warning was given as the result of several complaints from residents about the cleanliness of certain areas. It also involved a situation in which Bonet was doing her nails at an improper time, and eating in the hallway. According to Reyes she approached Bonet about this and Bonet's comment was, ''Oh, somebody already snitched on me.''

On one of the written warnings given Bonet on June 24 she handwrote near the printed word suspension, ''3 days; 6—25—7—13—14.'' Bonet testified that Reyes put these words on the warning form and she went over it with a pen because the writing was not clear. She marked the dates, which she contends were the days she was to be suspended, so she would not forget them. There was a question in this regard because she was scheduled for vacation beginning June 28 and was scheduled to return on July 12. She testified that because of this situation, she was to take 1 day of suspension on June 25 and the other 2 on the first 2 days following her scheduled return from vacation, that is, July 13 and 14. The warning form for leaving the tissue on the floor has written in the same spot ''3 days, effective 6/25/93.'' Respondent had the original warning for the call outs and it did not have the writing which Bonet claimed Reyes put on it.[5] These warnings indicate they are final warnings and that Bonet would be terminated if she again violated company policy in these regards. Bonet admitted on cross-examination that Acousti explained this to her. Reyes testified that at the time these warnings were given, Bonet was verbally told that she would be terminated if her behavior with regard to absenteeism continued.

Bonet served her suspension sandwiched around her vacation. While on vacation she received a subpoena from the Board to appear before the Board at its Hartford, Connecticut office at 11 a.m. on July 19 to testify in Case 34–CA–5853, et al., the case which is discussed earlier in this decision. On July 15 she reported back to work and told Reyes that she had been subpoenaed to appear at the Board on July 19. She gave the subpoena to Reyes, and also told her that she was scheduled to have a treatment for her back on July 19. Reyes said nothing and returned the subpoena. According to Bonet, there was no discussion on July 15 about changing Bonet's hours on July 19. On July 17, Bonet came to work 30 minutes late.

On Monday, July 19, according to Bonet, she went to therapy for her back and then went to the Board's offices and testified in the involved hearing pursuant to the subpoena. Appearing for Respondent in the hearing on that date were its counsel and, inter alia, Supervisor Reyes. Reyes testified, with respect to July 19, that Bonet had given her the subpoena and at the time told Reyes that she, Bonet, could not financially afford to lose any more hours from work. According to Reyes, Bonet then asked her to arrange for her to work in the morning so she could work and still attend the hearing. Reyes told her that was no problem. After getting Acousti's approval, Reyes gave Bonet an amended schedule for July 19, one that scheduled her to work from 7 a.m. to 12 p.m. Bonet did not report to work on July 19 and did not call in. Reyes testified she had not been told about the alleged therapist appointment on July 19. According to Reyes, Bonet arrived at the hearing after noon.[6]

Bonet was not scheduled to work on July 20, and on July 21, called out sick because of back pain. She also called out sick on July 22 and 23. She was not scheduled to work on July 24 and 25. She called out sick because of back pain on July 26 and 27. A copy of Bonet's phone bill reflects she called Respondent on July 22 at 12:14 a.m., on July 23 at 6:35 a.m., on July 26 at 5:18 a.m., and on July 27 at 4:53 a.m. The entry for July 23 reflects that on that date, Bonet violated the Respondent's rule that sick out calls must be made 2 hours before the scheduled start of the shift.[7]

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2. If you cannot report to work, you must call in and speak to either your Supervisor or the Nursing Supervisor during hours when your Supervisor is unavailable, at least two (2) hours before the start of your shift. This will permit your Supervisor to make other arrangements to get your job done.

You should also know the following types of absenteeism will have the indicated results:

1. If you are absent for two (2) consecutive days without calling in to explain why you are not at work, you will be considered to have voluntarily resigned from your position, unless you can demonstrate that you were unable to contact your Administrator, Department Head, or Supervisor.

2. Excessive absenteeism is defined as two (2) or more instances of unexcused absence in any 30 consecutive day period. Two (2) times late or two (2) time left early or a combination of one (1) late and left early will count as one (1) occurrence of absence. If your attendance reflects these patterns of behavior, your Supervisor will call it to your attention and issue an official verbal warning. If you continue to violate this policy, you will be issued a second written warning. Further violation will result in the issuance of a final written warning and ultimately termination of your employment if you disregard the final warning.

[3] On the record in this proceeding, Respondent's counsel stated that the Respondent admits Bonet called in on the occasions in question.

[4] There were two written warnings prepared for these incidents. The first relates to the two missed days and is dated June 21. The second relates to the tissue matter, called ''unsatisfactory work performance'' and is dated June 25. It does not specify what constituted the unsatisfactory work performance. No explanation was offered with respect to the conflict between the date of the latter warning and the testimony that this warning was given on June 24, a day earlier than the date of the warning.

[5] This bit of evidence is not important except that it is an indication of a lack of credibility on the part of Bonet.

[6] Reyes testified that she first heard about the therapist appointment at the unemployment hearing held on Bonet's claim for unemployment compensation following her discharge.

[7] Bonet, on cross-examination, denied knowledge of the Respondent's rules on absenteeism and calling out sick. I do not credit her denial. She had signed, on February 2, 1990, a form reading: ''I have read and understand the company's policy on excessive absenteeism. A copy of the policy has been provided to me.'' She also had been warned earlier about excessive absenteeism, and regardless of the motivation behind the earlier warnings, certainly should have

Continued

On July 27, Administrator Acousti called Bonet at home in the morning asking Bonet why she was out. Bonet explained it was because of her back. Acousti asked when she was going to be able to return to work and Bonet said she didn't know. Acousti asked why Bonet had not contacted her supervisor and let her know how long Bonet would be absent. According to Bonet, ''I told Janet Acousti, the Administrator, I can't tell Raquel Reyes how long I'm going to be out because I have to wait for my results tomorrow. Tomorrow was July 28 of '93. Then I'm going to see Raquel Reyes with my results and then I can tell her how long I [am] going to be out.'' According to Bonet, Acousti said, ''Well, Ramonita, you know that you are not reliable. You're not—you know, we are not your baby sitter, and you know that no matter what, we have 120 beds to clean, and I have to run this hospital. So, I [am] calling you to let you know that we are terminating you.''

Bonet testified that Acousti continued, giving her two reasons for her termination. The first was for not calling in or reporting to work on July 19, and Acousti did not know where she was on that date. Bonet told her that Reyes knew where she was because Reyes was at the Board when Bonet testified. Acousti then mentioned the earlier 3-day suspension for poor work performance.[8] Acousti said she would mail Bonet her last check. Later that day, Bonet called Reyes and said she would come and pick up her check. Reyes said to come in the next day. She went to the nursing home on July 28 and met with Acousti and Reyes. According to Bonet, they had put all the reasons for her discharge in one large warning and asked her to sign it. Bonet refused, got her last paycheck and left.

The Respondent's termination form under the printed portion reading ''Reason for Notice'' reflects ''Absenteeism, Type C Minor'' and ''Lateness, Type C Minor and Type B #14.'' Under the ''Comments and Explanation'' section is written: ''Ramonita Bonet on 7/17 punch in late–8:30 am. On 7/19/93, she was scheduled 7am–12pm, no call, no show. On 7/21/93, 7/22/93, 7/26/93, Ramonita Bonet called out. On 7/23/93, Ramonita violated the two hour before shift to call out policy.'' ''(a) excessive absenteeism. (b) failure to notify supervisor.'' A note from Acousti at the bottom of the form states: ''Phoned Ramonita 7–27–93 at 10:10 am [telling her] that due to her lack of responsibility and reasons [given] above, she is not longer eligible to be employed at Care Manor.''

Bonet filed for unemployment compensation and was challenged by Respondent. Respondent's stated reason for the termination was given as ''excessive absenteeism, no show, no call, failure to notify supervisor.'' A further form filed in connection with the claim tracks the termination report described above.

Supervisor Reyes testified prior to Bonet's July absences, Bonet had discussed her need to go to therapy. Reyes testified that she told Bonet, ''Listen, just let me know when you have to go. Bring in the doctor's note. I'll work around you. That would not be a problem.'' According to Reyes, she never received a doctor's note for any of the July absences though she asked for them. In this regard, Bonet testified, ''I was not allowed to be out all I wanted. But if I am sick, I cannot work for a day or two, I'm supposed to call. That's what I did. And I'm supposed to bring papers to my supervisor. That's what I supplied [them] with.'' In response to Respondent's counsel's question if she supplied such paper to her supervisor for the July absences, Bonet testified, ''She didn't give me a chance. I was fired before—before I had a chance to get the papers.'' At a different point in the record, she testified that she gave Reyes the doctor's notes after her hearing on unemployment compensation. On rebuttal, Bonet claimed that she was never asked by anyone from Respondent for doctor's notices. Again, because of Bonet's shifting testimony, I credit Reyes' testimony over that of Bonet.

Reyes testified that she attended the unemployment compensation hearing and heard Bonet testify that she had her time of appearance at the Board hearing changed to 1 p.m., and admit that she had not supplied Respondent with doctor's excuses for her July absences.

Among other things, this case turns on credibility. At the hearing I carefully observed the witnesses, and writing this decision, I again carefully considered the testimony of Reyes versus Bonet. I credit the testimony given by Reyes over that given by Bonet whenever there is a conflict between the two. I found Bonet's testimony to often be inconsistent and shifting, and in the case of her professed lack of knowledge of the Respondent's attendance rules, unbelievable. Similarly, her allegations of the reasons Acousti gave her for her discharge do not comport with written company documents given Bonet on the same day.

C. *Conclusions with Respect to Alleged Unfair Labor Practices*

Under *Wright Line*, 251 NLRB 1083 (1980), General Counsel has the burden of showing animus on the part of the Respondent and further, that Bonet's union activity was motivating factor in its decision to discipline her. It is clear that Respondent was aware of Bonet's union activity, and was well aware that she testified against the Respondent in the July 19 hearing. I am certain of Respondent's animus. Although the record in this case is weak in that regard, I must note that on the same day that I heard this case, I heard another case, Case 34–CA–6258, in which Respondent's animus toward the Union was strongly shown. Similarly, animus is shown in the earlier judge's decision in Case 34–CA–5853, et al.

On the other hand, I do not believe that animus was shown to be a motivating factor in the decision to terminate Bonet, and alternatively, the record supports a finding that Respondent had legitimate business reasons for which it would have terminated Bonet absent any discriminatory motivation. I credit Respondent's testimony that Bonet was terminated for violation of its absenteeism policy. Bonet violated the policy in August 1991 and received an official verbal warning.[9] She again admittedly violated the policy in

become familiar with the Respondent's policies about absenteeism because of them.

[8] Reyes denied that the discharge had anything to do with the earlier poor work performance warning and was only given for the reasons given in the termination report form. As Reyes testimony in this regard is supported by the termination forms, I credit this testimony over that of Bonet.

[9] She also violated the policy in December 1992; however, that violation was excused by the administrative law judge in the prior decision and I do not rely on that disciplinary warning.

June 1993 and received a final warning and was verbally told continued similar behavior would result in termination. As I have credited Reyes' testimony over Bonet's, I find that she again violated the policy by failing to call in on July 19, by calling late on July 21, and by missing several consecutive days just prior to her termination.

By her own admission, Bonet did not give Acousti or Reyes any notice that she was going to miss 6 consecutive days of work. She provided no medical documentation to them to support her claim that she was medically unable to work. There is no showing that the Respondent has excused such repeated violations of its absenteeism policy with other employees. This is not a case where a respondent has manufactured a reason to rid itself of a union adherent. Bonet repeatedly violated a nursing home policy, a policy for which good reason exists. The Act should and does afford protection for those employees who choose to support a union against an employer which harbors union animus. It does not afford an employee immunization, however, against discipline for clear violations of known policies that are evenhandedly applied. I cannot find that Bonet was unlawfully discriminated against as alleged in the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(5) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not engage in unfair labor practices as alleged in the complaint.

[Recommended Order omitted from publication.]